

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-6139

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- -X
SECURITIES AND EXCHANGE COMMISSION)
and SECURITIES INVESTOR PROTECTION)
CORP.,)
Plaintiffs-Appellee)
-v-)
EXECUTIVE SECURITIES CORP. and)
RICHARD O. BERTOLI)
Defendants.)
RICHARD O. BERTOLI)
Defendant-Appellant)
----- -X

CIVIL APPEAL

Docket No. 77-6139

BRIEF AND JOINT APPENDIX ON BEHALF
OF RICHARD O. BERTOLI, DEFENDANT-APPELLANT

RICHARD O. BERTOLI
Pro Se
One Van Terrace
Sparkill, New York 10976
(914) 359-5729

Dated: Sparkill, New York
October 12, 1977

PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

SECURITIES AND EXCHANGE COMMISSION)
and SECURITIES INVESTOR PROTECTION)
CORP.,)

CIVIL APPEAL

Plaintiffs-Appellee)

Docket No. 77-6139

-v-)

EXECUTIVE SECURITIES CORP. and)
RICHARD O. BERTOLI,)

Defendants.)

RICHARD O. BERTOLI,)

Defendant-Appellant)

- - - - -X

BRIEF AND JOINT APPENDIX ON BEHALF
OF RICHARD O. BERTOLI, DEFENDANT-APPELLANT

Richard O. Bertoli
Pro Se
One Van Terrace
Sparkill, New York 10976
(914) 359-5729

Dated: Sparkill, New York
October 12, 1977

TABLE OF CONTENTS

	<u>Page</u>
Issues Presented for Review	1
Procedural History	2
Statement of Facts	5
Argument	6
Point I - SIPC Trustee Cannot Seek to Enjoin Appellant from Raising Constitutional Issues	6
Point II -The District Court Cannot Restrict, Hinder or Obstruct Appellant in the Exercise of his Constitutional Rights in a Pending Criminal Trial in Another Jurisdiction	7
Point III-The District Court Cannot Order an Adversary Trial to be Commenced by a Bankruptcy Judge where Appellant Has Not Consented to the Jurisdiction of said Forum or is not a Party to the Bankruptcy Action	8
Point IV -The SIPC Trustee Waived Any Right to Object to Appellant Moving to Suppress Books and Records in any Forum	8
Point V - The District Court Erred in Granting Relief Not Sought in the Moving Papers of the Movant and by Not Holding an Evidentiary Hearing Where There is a Clear Dispute in the Facts	9
Election Under Rule 24(c) of the F.R.App.P.	9
Conclusion	10
Joint Appendix - Index to Joint Appendix	11

ISSUES PRESENTED FOR REVIEW

Can a District Court empower a SIPC Trustee appointed by said Court, to prevent appellant's challenge against SEC for illegal seizure and search of records prior to appointment of said Trustee?

Can a District Court, upon application of SIPC Trustee, enjoin a hearing before an SEC Administrative Law Judge wherein appellant seeks to suppress evidence seized and searched prior to the appointment of said Trustee?

Does a SIPC Trustee have standing in the District Court to apply for stay of SEC Administrative Hearing in which he is not involved and which relates to illegal seizure and search of premises prior to his appointment?

Can a District Court disregard, hinder or obstruct the exercise of appellant's rights in a pending criminal trial by allowing the filing of a motion to suppress but restricting appellant's full exercise of his rights?

Can a District Court enjoin appellant from raising meritorious issues and facts in any other forum with respect to Constitutional questions involving illegal search and seizure by agents of the Government which commenced prior to the appointment of the SIPC Trustee and continued thereafter?

Can a District Court order an adversary trial to be commenced before a bankruptcy judge against appellant who has not waived jurisdiction of the bankruptcy court and is not a party to the bankruptcy action?

Did the SIPC Trustee waive his right, if any, to object to appellant moving to suppress books and records by his failure to move after having obtained knowledge of said actions for a period of over sixteen months?

Does the Order of Judge Tenney violate the rights of appellant under the First, Fourth, Fifth and Sixth Amendments to the Constitution?

Can a District Court enjoin appellant from filing a criminal complaint for trespass against an admitted interloper?

Can a District Court grant relief to the SIPC Trustee not sought in the moving papers without an evidentiary hearing where there is a dispute in the facts?

PROCEDURAL HISTORY

On February 14, 1975 at 3:40 P.M., Cameron F. MacRae III (MacRae) was appointed under the Securities Investor Protection Act (SIPA) at the direction of the Securities Investor Protection Corp. (CIPC) as Trustee of Executive Securities Corp. (Executive) by the Honorable Charles H. Tenney.

At the time appellant was President of Executive and consented to said appointment.

On or about February 28, 1975, the SIPC Trustee placed Executive into bankruptcy and the Honorable John J. Galgay was ordered by Judge Tenney as bankruptcy Judge.

Said bankruptcy included only Executive and did not include Diversified Financial Services, Inc. (Diversified); DLI Securities Corp. (formerly known as Dopler & Co., Inc.) (Dopler); S.B. Levy & Co., Inc. (Levy) or Paramount Leasing Corp. (Paramount).

Paramount, a public owned company, filed periodic reports with the SEC and was the parent of Dopler, Levy and Diversified. Appellant was the President of all four corporations.

An illegal search and seizure was conducted on premises rented to Diversified by agents of the Government.

As a result thereof, the following actions were taken by appellant:

1. On April 26, 1976, an action entitled Richard Bertoli v. Roderick Hills as Chairman of the Securities and Exchange Commission, 76 CIV 1962 (RO) was filed by appellant to suppress certain specified records before an administrative proceeding in the matter of Richard Bertoli, et al, File No. 3-4618. On June 2, 1976, said action was dismissed on the basis of failure to exhaust

administrative remedies with a strong direction to the SEC to hear said motion. The SIPC Trustee informally participated in said action by providing an affidavit of himself and two of his employees, as well as conducting an all-day conference at his offices with the SEC staff.

2. On June 8, 1976, a motion to suppress was filed before the SEC Administrative Law Judge Max O. Regensteiner (ALJ). A prima facie case of illegal search was established on July 1, 1976 and the SEC staff then sought to disrupt and abort said hearing by varying delaying tactics including motions to dismiss, adjourn, etc., all of which were denied. The SIPC Trustee participated informally in said hearing by providing his counsel and three employees as witnesses for the SEC and his correspondence file with appellant.

3. On July 22, 1977, a subpoena was issued by the ALJ after an offer of proof by appellant calling for the appearance of the SIPC Trustee on August 4, 1977.

As a result of the service of said subpoena, MacRae moved on August 1, 1977, by way of an Order to Show Cause on the eve of the resumption of a long delayed suppression hearing to:

A. Permanently enjoin Richard O. Bertoli and the Securities and Exchange Commission from further proceeding upon Bertoli's motion to suppress and return to him documents allegedly seized by the SEC staff from the 8th, 3rd and 11th floors of One Exchange Place in Jersey City, New Jersey; and

B. Staying a subpoena served by Bertoli upon the Trustee on July 27, 1977.

A temporary restraining order was entered on August 1, 1977 by Judge Tenney and the hearing on the Order to Show Cause was heard on August 9, 1977.

Seeing that there was no lawful authority to stay the administrative proceeding or to quash the subpoena, Judge Tenney, without evidentiary hearing

or opportunity of appellant to challenge the issues then grasped at a straw and entered the order to which the appellant is hereby appealing.

On August 29, 1977 as a result of Judge Tenney's Order Administrative Law Judge Max O. Regensteiner issued an order precluding further hearings on the motion to suppress.

STATEMENT OF FACTS

An 11th floor storage room located at One Exchange Place, Jersey City, New Jersey was rented to Diversified and used to store personal records of appellant and companies other than Executive under the control of appellant.

All invoices for rent, in the amount of \$50 per month for said storage room was billed by the landlord FSL Realty Corp. (FSL) to Diversified.

The rent for the storeroom was paid by cashiers check drawn on the Bank of North America or the Chelsea National Bank because Diversified had no bank account.

No records of Executive were stored in said storage room and Executive did not use the room for any purpose.

Sometime between February 13, 1975 (prior to the appointment of the SIPC Trustee) and February 19, 1975, a break-in of the storage room was made by a person(s) presently unknown and strong evidence points towards SEC staff members as said unknown person(s).

Faced with the problem of criminal trespass, the SIPC Trustee sought an ex parte order from Judge Galgay to remain in possession of the books of Dopler & Co., Inc. and S.B. Levy & Co., Inc. on July 16, 1975. The application for said order did not mention how possession was obtained or the fact that entry was made forcibly by the use of a screwdriver.

The records contained in said storage room were either copied or removed by agents of the Government and widely dispursed. Appellant has no interest at this time in the return of said records, as a result thereof, and merely desires that they not be used in any proceeding against him.

The Administrative Law Judge (ALJ) heard the testimony of the landlord; the former officers of Executive; the parties who negotiated for the storage

room; the counsel and employees of the SIPC Trustee; and the appellant. After having the opportunity of observing the witnesses and after 22 days of testimony and hundreds of exhibits, the ALJ made a preliminary determination that the storage room was not under the authority, custody or control of the SIPC Trustee at the time of the alleged break-in(s).

POINT I

SIPC TRUSTEE CANNOT SEEK TO ENJOIN
APPELLANT FROM RAISING CONSTITUTIONAL
ISSUES

The SIPC Trustee of Executive, seeking to protect himself from personal liability, sought by Order to Show Cause to quash a subpoena duly served upon him and to stay an administrative hearing before the SEC.

Although said requests were not dealt with by Judge Tenney, his Order effectively granted said request by enjoining appellant from raising issues concerning the occupant of an 11th floor storage room and the ownership of the records contained therein.

Appellant has allowed the SIPC Trustee access to the records contained in said storeroom and has not demanded the return of said records. Said records by agreement between appellant and the Trustee are in the custody of the Court until the liquidation of Executive is completed.

The estate of Executive cannot be harmed by any decision granted by any judge in any forum concerning a motion to suppress, filed or to be filed by appellant or others.

Indeed, the only harm to the Estate can be the waste of funds in commencing and prosecuting this collateral attack at a motion to suppress brought by appellant.

The SIPC Trustee has no legal authority to encroach upon the due

process rights of appellant and has no standing to stay any proceeding in any forum or to encroach upon said proceeding by seeking to influence the judgment of the trier of facts.

POINT II

THE DISTRICT COURT CANNOT RESTRICT, HINDER OR OBSTRUCT APPELLANT IN THE EXERCISE OF HIS CONSTITUTIONAL RIGHTS IN A PENDING CRIMINAL TRIAL IN ANOTHER JURISDICTION

The Order of Judge Tenney states in pertinent part:

"ORDERED that Richard O. Bertoli and Alfred B. Averell, Jr. be, and each of them hereby are permanently enjoined from (a) in any way attacking, contesting, bringing into question or denying the rightful possession by the estate of Executive Securities Corporation ("Executive") and by the Trustee or (b) claiming possession or entitlement on their own behalf or on behalf of any other person or entity, of any property over which Executive or the Trustee has or heretofore had possession or exercised control (including but not limited to the premises occupied by Executive Securities Corporation on the 8th, 3rd and 11th floors of One Exchange Place, Jersey City, New Jersey and 25 Broadway, New York, New York, and all books, records, documents and other property which were located, on the date of the Trustee's appointment, on said premises) in any forum or before any person other than the Bankruptcy Court of this District and the Bankruptcy Judge to whom this matter has been assigned;" (underscored for emphasis)

Said Order, although not preventing the filing of a motion to suppress, restricts, hinders and obstructs appellant from presenting all of the issues to the trier of fact.

The ALJ in the matter of Richard Bertoli has stopped the hearings on a motion to suppress before the SEC as a direct result of the Order of Judge Tenney.

A motion to suppress has been filed by appellant in a criminal matter before Chief Judge Lawrence A. Whipple in the U.S. District Court for the District of New Jersey. Said motion has not been scheduled for an evidentiary hearing to date.

Appellant will, as a direct result of the Order of Judge Tenney, be prohibited from introducing issues concerning ownership of books and records and the occupants of the storeroom forcibly entered by agents of the Government.

Said Order violates due process rights of appellant.

POINT III

THE DISTRICT COURT CANNOT ORDER AN
ADVERSARY TRIAL TO BE COMMENCED BY
A BANKRUPTCY JUDGE WHERE APPELLANT
HAS NOT CONSENTED TO THE JURISDICTION
OF SAID FORUM OR IS NOT A PARTY TO
THE BANKRUPTCY ACTION

Appellant has not consented to the jurisdiction of the bankruptcy court and is not a party to the bankruptcy action.

Any adversary proceeding should be in the civil court where full due process rights will be accorded.

To date, the bankruptcy judge has denied all discovery prior to the trial; has denied a motion to exclude under Rule 615 of the F. R. Civ.P.; has allowed testimony in violation of Rule 602 of the F. R. Civ. P.; and has, because of the heavy bankruptcy calendar, not been able to devote more than partial days to the trial which although commenced on September 21, 1977 has not been concluded to date.

Only the civil trial court is equipped to handle a trial which will encompass a minimum of 8 days to its conclusion when discovery is not available to the parties.

Indeed, as a result of the violations of due process already committed in the bankruptcy court, reversible error has already set in.

POINT IV

THE SIPC TRUSTEE WAIVED ANY RIGHT TO
OBJECT TO APPELLANT MOVING TO SUPPRESS
BOOKS AND RECORDS IN ANY FORUM

The SIPC Trustee has been aware for over 16 months of the suppression

actions commenced by appellant.

Any action to stay said proceedings have, therefore, been waived or barred by laches.

POINT V

THE DISTRICT COURT ERRED IN
GRANTING RELIEF NOT SOUGHT
IN THE MOVING PAPERS OF THE
MOVANT AND BY NOT HOLDING AN
EVIDENTIARY HEARING WHERE
THERE IS A CLEAR DISPUTE IN
THE FACTS

The moving papers of the SIPC Trustee ask for a stay of an SEC Administrative Proceeding and the quashing of a subpoena served upon the SIPC Trustee.

Judge Tenney granted relief not sought by the SIPC Trustee. Ironically, the relief granted by Judge Tenney effectively granted relief which he could not have granted by law through a disingenuous decision which, by effect, created what he could not have lawfully done under the circumstances --- stay an SEC Administrative Hearing and quash a duly served Administrative Subpoena.

The facts presented before Judge Tenney are in dispute. Appellant presented affidavits of himself, Arnold Freilich, Robert Nelson, Joseph Lugo, Arthur Netter, Frederic Brooks, all of which had personal knowledge of the facts and the SIPC Trustee presented pure conjecture in the affidavit of his counsel, Eric Moss, who does not have personal knowledge of the facts.

The only factual issues before Judge Tenney, therefore, were the affidavits presented by appellant. Yet, in the face of the law and without evidentiary hearing, Judge Tenney gave his order which is the subject of this appeal.

ELECTION UNDER RULE 24(c) OF THE F. R. APP. P.

In accordance with Rule 24(c) of the Federal Rules of Appellate Pro-

cedure, the appellant, having previously been allowed to proceed in forma pauperis, requests that the appeal be heard as to facts on the original record and this brief is filed in typewritten form in accordance with said rule.

CONCLUSION

WHEREFORE, the Order of Judge Tenney should be reversed on the basis of the record and the aforementioned argument.

Respectfully submitted,

Richard Bertoli
Richard Bertoli

Richard Bertoli, Pro Se
One Van Terrace
Sparkill, New York 10976
(914) 359-5729

JOINT APPENDIX

INDEX TO JOINT APPENDIX

Order to Show Cause Dated August 1, 1977 and Trustee Memorandum of Law	1
Affidavit of Eric Moss Dated July 29, 1977	2
Reply Affidavit of Richard Bertoli Dated August 5, 1977	3
Transcript of Hearing Dated August 1, 1977	4
Transcript of Hearing Dated August 9, 1977	5
Affidavit of Leo Gitlin Dated August 8, 1977	6
Memorandum of Judge Tenney Dated August 25, 1977, filed August 24, 1977	7
Order of Judge Tenney Dated August 25, 1977, filed August 25, 1977 . . .	8
Letter of Richard Bertoli to Court Dated August 5, 1977	9
Letter of Richard Bertoli to Court Dated August 16, 1977	10
Letter of Richard Bertoli to Court Dated August 22, 1977	11
Letter of Richard Bertoli to Court Dated August 25, 1977	12
Notice of Appeal.	13
Order for Defendant to Proceed in Forma Pauperis	14

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - -X

SECURITIES AND EXCHANGE COMMISSION)
and SECURITIES INVESTOR PROTECTION)
CORP.,)

Plaintiffs-Appellee)

CIVIL APPEAL

Docket No. 77-6139

-v-

EXECUTIVE SECURITIES CORP. and)
RICHARD O. BERTOLI,)

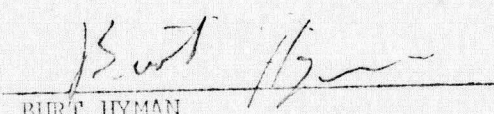
Defendants.)

RICHARD O. BERTOLI,)

Defendant-Appellant)

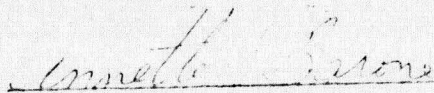
- - - - -X

I, BURT HYMAN, declare under penalty of perjury that I have served a copy of the attached Brief and Joint Appendix on Behalf of Richard O. Bertoli, Defendant-Appellant upon LeBoeuf, Lamb, Leiby & MacRae, 140 Broadway, New York, New York, by mailing it on October 12, 1977 from the mailbox at Rutherford, New Jersey at 9:00 A.M.


BURT HYMAN

21 Ridge Boulevard
Port Chester, New York

Sworn and subscribed to before me
this 12th day of October, 1977.


Connetto

CLERK OF COURT
NEW JERSEY
10/12/77

